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International Judicial Assistance in China: Plodding into the Twenty-First Century**

International judicial assistance is a relatively new field in the law of the People's Republic of China (PRC).[1] It was not until 1982, more than thirty years after the founding of the PRC, that China enacted skeletal legislation on international judicial cooperation in its first civil procedure law.[2] The torpid pace of progress in this area is not, however, peculiar to China. The United States, for example, had only one treaty and no comprehensive legislation at all on judicial assistance in civil and commercial matters before 1964,[3] considerably behind Europe, which produced its first international convention on civil procedure in

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1. Broadly speaking, international judicial assistance is the assistance a domestic court renders to foreign courts and litigants in their judicial proceedings. See, for the definition, *Kokusai Shiho Kyojo [International Judicial Assistance], in* KOKUSAI MINJI SOSHOHO NO LIRON [THE THEORY OF INTERNATIONAL CIVIL LITIGATION] 285 (Takao Sawaki & Yoshimitsu Aoyama eds., 1987). The terms "judicial assistance" and "judicial cooperation" are used interchangeably elsewhere and throughout this article, and the adjective "international" will often be omitted for the sake of brevity. See, for the terms, Bruno A. Ristau, *Concepts of Judicial Cooperation,* 1986 ARIZ. J. INT'L COMP. L. 9, 13.

2. *See* Civil Procedure Law of the People's Republic of China (for trial implementation), arts. 196, 202–205 [hereinafter old Civil Procedure Law] (adopted on Mar. 8, 1982, and implemented on a trial basis as of Oct. 1, 1982), *in* 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979–1982, at 259, 294–95 (1987).

3. In 1964 the U.S. Congress amended the United States Code to include section 1696 of title 28, which deals with foreign service in the U.S., and section 1781 of title 28, which deals with the authority of the Department of State to handle letters rogatory to and from the United States. *See* 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE § 1–4, at 9–10 & § 2–1, at 14 (1986) [hereinafter RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE].

Prior to 1964 the only U.S. bilateral treaty on judicial assistance was with the Soviet Union, signed in 1935, whereby the U.S. Department of State and the Soviet foreign commissar agreed to transmit requests for judicial assistance to their respective local authorities. *See* Bruno A. Ristau, *Overview of International Judicial Assistance,* 18 INT'L LAW. 525, 526 (1984).

1896.[4] While both China and the United States are relative newcomers to the field of judicial assistance, the reasons for their late starts and the strategies they adopted to catch up are entirely different and reflect radically distinct world views.

China's general aversion to international judicial assistance is illustrated by the reluctance of the judiciary to recognize foreign decisions and procedures based on the belief that such recognition might constitute an infringement of the country's territorial sovereignty.[5] By comparison, the United States endorses, in theory, an international approach to resolving the conflicts that arise concerning judicial assistance. In practice, however, the U.S. Supreme Court narrowly interprets the scope of international conventions, preferring instead its own domestic procedures.[6] While both China and the United States show a reluctance to apply civil procedures that are not strictly their own, the psychological sources for such reluctance are quite different. The American hesitance to adopt wholeheartedly the procedures of international conventions springs from a fear of diluting what they believe to be superior procedures for the sake of accommodating inferior foreign legal systems.

The Chinese hesitance springs from a double-edged sense of inferiority and superiority that makes authorities suspicious of foreigners and cautious in dealing with foreign countries. Its origins lie in decades of isolation from the West and the vivid memory of the century-long humiliation suffered at the hands of the imperial powers,[7] as well as an historical belief that China was the Celestial Kingdom and that its culture was superior.[8] This ethnocentrism has continued to dissuade the Chinese authorities from requesting or rendering any form of assistance to western "barbarian" countries. These elements of China's psychology make the implementation of reforms in international judicial assistance problematic.

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4. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 3, § 1–2, at 5. The Convention on Civil Procedure of November 16, 1896, was concluded at the Second Conference on Private International Law which convened in 1894 at the Hague. *Id.*

5. *See* Han & Li, *Research on Conflict of Law Shall Be Emphasized, in* 1 ZHONGGUO FAXUE LUNWENJI [COLLECTIONS OF CHINESE LEGAL ARTICLES] 499–506 (1984) (in Chinese).

6. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) for a narrow interpretation of the scope of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention]; *and* Société Nationale Industrielle Aérospatiale v. United States Dist. Court 482 U.S. 522 (1987) for a narrow interpretation of the scope of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention].

7. For example, the extraterritorial treaties, such as the Treaty of Nanking with Great Britain (1842), stipulated that any allegations of unlawfulness by foreign nationals could only be adjudicated by a tribunal established by the consulate of the foreign state involved. *See* G. W. KEETON, THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA (1969); and JOHN C. VINCENT, THE EXTRATERRITORIAL SYSTEM IN CHINA: FINAL FINAL PHASE (1970).

8. *See, e.g.*, JONATHAN D. SPENCE, THE GATE OF HEAVENLY PEACE: THE CHINESE AND THEIR REVOLUTION, 1895–1980 (1981).

Regardless of past shortsightedness and aversion, international judicial assistance is now seen to be an important concern for China, the United States, and indeed for the whole world. The rapid development of technology in communications and transportation has forged bonds of interdependency between nations allowing for greater commercial and social interaction.[9] Furthermore, concomitant with the growing international character of business is an increased need for more developed and sophisticated international judicial procedures. This development is particularly crucial for China which, since 1978, has advanced an open policy to the outside world to encourage foreign trade and investment.[10] Nevertheless, in order to promote trade and investment, foreign partners need to be assured of an accessible and effective judicial mechanism for addressing matters under dispute. Hence, if China hopes to succeed in its policies of openness and economic reform, it must pay greater attention to the task of articulating mutual judicial assistance in dispute settlement.

Commerce is not the only area where judicial assistance is important. At present, millions of overseas Chinese generate a large volume of international litigation, particularly in marriage and divorce proceedings, custody of children, division of property, and questions of inheritance. A fair resolution of these disputes requires expedient procedures that can be applied consistently and uniformly, irrespective of the nationality of the litigants or the forum for the settlement.

The purpose of this article is to summarize China's progress in the area of international judicial assistance and to analyze the obstacles that impede its further advancement. Since the field of private international law has no authoritative definition of judicial assistance, the Chinese understanding of judicial cooperation must be gleaned from the PRC's skeletal domestic legislation, the increasing number of bilateral and multilateral agreements it has concluded, and the practice during the past forty plus years of its existence. To highlight the strengths and weaknesses of China's judicial assistance system, it is contrasted with that of the United States and other countries.[11]

9. During the 1980s China's foreign trade increased dramatically, with imports rising 166 percent from U.S. $20 billion in 1980 to U.S. $53.3 billion in 1990; and exports climbing a staggering 242 percent from U.S. $18.1 billion to U.S. $62 billion in the same period. Foreign investments also grew rapidly from virtually nothing in 1978 to U.S. $46.09 billion in the five-year period between 1986 and 1990 with more than 10,000 foreign-backed enterprises in operation by the end of 1990. Similarly foreign exchange from tourism jumped 96.3 percent between 1986 and 1990. *See Statistical Communique on 7th 5-Year Plan—Part 2*, F.B.I.S. DAILY REPORT: CHINA [hereinafter FBIS-CHI] FBIS-CHI-91-060, at 36 (28 Mar. 1991); *and Xinhua Cites Statistics of Decade's Progress*, FBIS-CHI-060, *supra* at 48 (28 Mar. 1991).

10. *See* DENG XIAOPING, *Speech at the Opening Ceremony of the National Conference on Science* (18 Mar. 1978), *in* SELECTED WORKS OF DENG XIAOPING (1975-1982), at 101, 106 (1984); *and Shijie Jingji Article Views Open-door Policy*, FBIS-CHI, *supra* note 9, at K5 (5 Apr. 1984).

11. The international conventions include the Hague Service Convention, *supra* note 6; the Hague Evidence Convention, *supra* note 6; Inter-American Convention on Letters Rogatory, done at Panama City Jan. 30, 1975, with additional protocol and annex, done at Montevideo May 8, 1979,

Narrowly defined, judicial assistance consists of only the service of documents and the taking of evidence, although broadly speaking it may also include the recognition and enforcement of foreign judgments and arbitral awards. This article confines itself to judicial cooperation in its narrow sense, in line with the position of some East Asian commentators.[12] It first examines China's judicial assistance in the absence of treaties and then explores that with treaty states.

I. Judicial Assistance in the Absence of Treaties

During the first thirty years of the PRC, government policy prohibited communication with the world beyond China's borders. Notwithstanding this policy, the presence of millions of Chinese overseas and extensive economic ties with Eastern Europe made China's involvement in international judicial assistance on civil, commercial, and even criminal matters inevitable. China did not, however, begin to engage in treaty arrangements on judicial assistance until the 1980s, and since 1986 China has negotiated ten bilateral judicial assistance conventions[13] and joined the 1965 Hague Service Convention.[14] In spite of recent progress in treaty arrangements, China's judicial assistance remains, for the time being, largely dependent on domestic law, especially normative interpretations. Since the domestic law is silent on assistance in criminal matters, such assistance has never been rendered to foreign countries without treaty obligations.[15] Judicial assistance based on domestic law therefore concerns only civil and commercial matters and provides for the service of documents by diplomatic channels, the post, agents ad litem, public notice and substitution, as well as the taking of evidence through diplomatic and consular channels.

A. Service by Diplomatic Channels

In the early years of the PRC, due to the murkiness of Chinese law and their ignorance of international practice, lower court judges were known to send summons and petitions directly to foreign courts in their own names requesting the return of expatriate citizens to China to participate in litigation.[16] This

OEA Documentos Officiales OEA/Ser. A/21 (SEPF); and the Inter-American Convention on the Taking of Evidence Abroad of Jan. 30, 1975 and the Additional Protocol Thereto of May 24, 1984, OEA Documentos Officiales, OEA/Ser. A/22 (SEPF).

12. *See, e.g., Kokusai Shiho Kyojo [International Judicial Assistance], supra* note 1.

13. Only three of the ten are in force at the end of 1991—those with France, Poland, and Mongolia. *See infra* notes 73–75.

14. *See infra* note 78 and accompanying text.

15. Hu Chi, *On Our Country's Judicial Assistance in Criminal Matters, in* Xuexi Yu Tansou [Study and Exploration] 53, 61 (1990).

16. For example, a county court in Shanxi province sent a summons to the Supreme People's Court of the People's Republic of Mongolia requesting them to return a defendant in a divorce case to his home town. Shewai Minshi Shouce [Handbook on Civil Matters Involving Foreign Elements] 157 (The Supreme People's Court, Civil Division ed., 1986) [hereinafter Handbook on Foreign Civil Matters].

practice was stopped when the Ministry of Justice reiterated in 1957 an earlier reply of the Supreme People's Court to the Hubei High People's Court declaring that all cases involving foreign elements be referred to an intermediate court as the court of first instance and handled according to Chinese law, with all documentation to be served abroad transmitted through diplomatic channels.[17] In the same year, the Ministry of Justice reaffirmed this directive in a notice circulated to all levels of the people's courts emphasizing that direct contact with foreign governments or courts was strictly forbidden and that all cases related to foreign countries must be conducted through the foreign affairs department of the level of government concerned.[18]

The first known guidelines on international judicial assistance were not promulgated by the Chinese authorities until 1966, when the Supreme People's Court issued a notice to the lower courts on the handling of divorce proceedings between Chinese citizens and North Koreans.[19] The notice created a summary procedure using diplomatic channels to effect judicial assistance. The procedure was so simple that it did not even require a Korean translation of the Chinese document to be served in that country. This summary procedure was possible because of the close diplomatic tie between the two countries and the large number of Koreans who have resided on the Chinese side of the border, resulting in a long tradition of intermarriage between Korean and Chinese citizens. The unique nature of the relationship between the two countries explains the absence of any comparable document on judicial assistance for over thirty years.

The notice also prescribed the format of the letter of request[20] to be sent by an intermediate people's court to a Korean court of corresponding level for the purpose of ascertaining the Korean party's position on the divorce proceedings, the division of matrimonial property, and the custody of children.[21] It further

17. *Reply of the Supreme People's Court Concerning the Procedure for Handling the Divorce Case of Zhu Hongzhun and Su Lan* (18 Oct. 1956), *in id.* at 155.

18. *Circular of the Ministry of Justice Notifying All Levels of the People's Court Not to Directly Contact Foreign Courts and Governments on Matters of Litigation, in* ZHONGHUA RENMIN GONGHEGUO FALU GUIFANXING JIESHI JICHENG [COLLECTION OF THE NORMATIVE INTERPRETATIONS ON LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] 1006 (Zhang Shijin et al. eds., 1990) [hereinafter COLLECTION OF NORMATIVE INTERPRETATIONS].

19. *Notice of the Supreme People's Court on the Handling of Divorce Cases between Citizens of China and Korea, in* HANDBOOK ON FOREIGN CIVIL MATTERS, *supra* note 16, at 160–63.

20. The terms "letter of request" and "letter rogatory" will be used interchangeably in this paper.

21. The format of the letter rogatory is as follows:

> To the *(insert title)* Court of the Democratic Republic of Korea:
>
> We are seized with the divorce case between *(insert Chinese petitioner's full name)* and *(insert Korean respondent's full name)* who currently resides in your country. The petition for divorce is enclosed herein. We would greatly appreciate any assistance you could provide in ascertaining the opinion of the respondent with regard to the divorce, the division of property and the custody of children. Please return the findings at your earliest convenience in order to expedite the handling of this matter.
>
> People's Republic of China
> *(Province)*
> *(Name of Intermediate Court)*

Notice of the Supreme People's Court on the Handling of Divorce Cases between Citizens of China and Korea, supra note 19.

stated that the letter rogatory could only be transmitted through the Ministry of Foreign Affairs, after first being examined by a High People's Court.[22]

The legislative framework on international judicial assistance first appeared in the old Civil Procedure Law of 1982, which contained only three makeshift provisions dealing with service of documents and taking of evidence.[23] And it was only in 1986 that the skeletal legislation was fleshed out by a joint notice of the Supreme People's Court and the Ministries of Foreign Affairs and Justice.[24] This administrative notice is the most authoritative regulation concerning the service of documents with foreign countries that have diplomatic relations with China but, as yet, have no treaties governing judicial assistance. According to the notice the following procedures must be adhered to if a foreign court wishes to serve legal documents in China's territorial jurisdiction:

1. (1) The embassy of the foreign country shall provide the legal documents to the Consular Section of the Chinese Ministry of Foreign Affairs. The documents shall then be transmitted to the proper high people's court for delivery to the party concerned through an intermediate people's court designated by the high court. After the party concerned signs the attached receipt of delivery, it shall be returned to the high people's court by the intermediate people's court and shall be

22. The High People's Court is immediately below the Supreme People's Court, but above the Intermediate People's Court. For China's court organization, see Organic Law of the People's Courts of the People's Republic of China, *in* 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979–1982, at 71. (1987).

23. These three provisions of the old Civil Procedure Law, *supra* note 2, read:

> [Article 196] A people's court may serve litigation documents to a party who does not reside in the People's Republic of China using the methods below.
>
> (1) It may serve the documents through diplomatic channels.
>
> (2) It may entrust the service of the documents on a party of Chinese nationality to the embassy or consulate of the People's Republic of China in the country where the party resides.
>
> (3) It may serve the documents by post if the law of the country where the party resides permits such service by post.
>
> (4) It may entrust a court of the country where the party resides with the task of serving the documents or use other means specified by agreement, if that country has judicial assistance agreement with the People's Republic of China.
>
> (5) It may serve the documents through the party's agent ad litem.
>
> (6) It may serve the documents by public notice, if none of the above-mentioned methods are practical. The documents shall be considered served six months after the date on which the public notice is issued.
>
> [Article 202] The people's courts of China and foreign courts may entrust each other with certain litigation actions in accordance with international agreements concluded or acceded to by the People's Republic of China or on the principle of reciprocity.
>
> Any matter entrusted to a Chinese court by a foreign court shall be rejected if it is incompatible with the sovereignty and security of the People's Republic of China; if the matter is outside its jurisdiction, the people's court shall return the entrusted matter to the foreign court with due explanation.
>
> [Article 205] When a foreign court commissions a people's court of the People's Republic of China to serve or assist in the execution of certain legal documents, or take certain litigation actions on its behalf, it must provide a Chinese translation of those legal documents and the power of attorney.
>
> When a people's court commissions a foreign court to serve or assist in the execution of certain legal documents, or to take certain litigation actions on its behalf, it must provide a foreign language translation of those legal documents and the power of attorney.

24. *Notice of the Supreme People's Court, the Ministry of Foreign Affairs and the Ministry of Justice Concerning the Provision of Assistance in the Delivery of Legal Documents through Diplomatic Channels between the Courts of Our Country and Foreign Courts* (14 Aug. 1986), *in* HANDBOOK ON FOREIGN CIVIL MATTERS, *supra* note 16, at 175–77 [hereinafter Delivery of Legal Documents].

transmitted to the requesting party through the Consular Section of the Ministry of Foreign Affairs. If a receipt of delivery is not attached, the intermediate people's court shall issue a certificate of delivery to the high people's court for transmittal to the requesting party through the Consular Section of the Chinese Ministry of Foreign Affairs.

(2) A letter rogatory shall be used to request the delivery of legal documents. A Chinese translation of both the letter rogatory and the legal documents to be delivered shall be attached to the originals.

(3) If the contents of the legal documents infringe upon the sovereignty or security of China, the request shall be refused; if the intended recipient of the documents is entitled to diplomatic privileges and immunity, the documents shall generally not be delivered; if the documents cannot be delivered because the Chinese courts do not have jurisdiction, the address is unclear or for any other reason, they shall be returned with a statement by the high people's court indicating the reasons for the failure to deliver. This statement shall be transmitted to the requesting party by the Consular Section of the PRC Ministry of Foreign Affairs.

2. Foreign embassies and consulates in China may deliver legal documents directly to their nationals in China, provided that no compulsion is used to effect the delivery.

Failure to abide by these procedures is held to invalidate the service altogether. Thus, in December of 1985 the Supreme People's Court refused to acknowledge the validity of the delivery of a divorce decree by a California court of appeals to the Intermediate People's Court of the City of Su Zhou, because the decree did not include a letter rogatory or a Chinese translation, and because it was not conducted through the appropriate diplomatic or consular channels. Since China and the United States have not yet negotiated a judicial assistance treaty, the service was held to contravene both China's Civil Procedure Law and international practice. The Supreme People's Court therefore ordered the Su Zhou People's Court to reject the service and return all the documents to the California court.[25]

Conversely, paragraph 4 of the notice also sets out the following procedures for the delivery of Chinese legal documents to parties in foreign countries through diplomatic channels:

4. (1) The legal documents to be delivered abroad shall first be approved by the higher people's court of the province, autonomous region, or municipality [from where the request originated] and then be trans-

25. *Reply of the Supreme People's Court to the Question of How to Handle Divorce Decrees Mailed Directly to the Chinese People's Court by a U.S. Court Through Non-Diplomatic Channels* (26 Dec. 1985), *id.* at 200.

mitted [to the requested country] by the Consular Section of the Ministry of Foreign Affairs.

(2) The correct name, sex, age, nationality and, written in the language of the foreign country, the address abroad of the intended recipient shall be provided with the document to be delivered. The material facts of the case shall be disclosed to the Consular Section of the Ministry of Foreign Affairs.

(3) A letter rogatory must be attached to the legal documents. If the name of the foreign court is not known, the request shall be addressed to the higher court of the jurisdiction in which the foreign party resides. A translation of the letter rogatory and the legal documents into the language of the requested country, or, with the consent of the country, into another language, shall also be attached. If the requested country requires the legal documents to be notarized or authenticated, the Consular Section of the Ministry of Foreign Affairs shall so notify the requesting people's court.

An expanded version of these procedures was incorporated into China's 1991 new Civil Procedure Law, which includes specific provisions for effecting judicial assistance through diplomatic channels. Article 263 of the law stipulates that, "the requirement and provision for judicial assistance must be carried out in accordance with the international conventions signed by the PRC. Where no such international conventions exist, diplomatic channels shall be employed."[26] The article goes on to decree that no foreign organization or person may serve legal documents or take evidence within the jurisdiction of the PRC unless it has been expressly approved by the appropriate Chinese authorities. Hence, in the absence of an international convention between China and a foreign country, diplomatic channels remain the chief method for dealing with judicial assistance.

China's reliance on diplomatic channels is reflective of the judiciary's cautious attitude towards interaction with foreign countries. In this respect, China, as a civil law country, regards service of process to be a judicial function.[27] By contrast, the United States, as a common law country, considers service to be a private function and is therefore more liberal in its approach. Federal and state laws permit such service to be effected by any individual, U.S. national, or otherwise, in person or by an agent, in civil, criminal, or administrative proceedings.[28] The procedures allow any concerned individual to send a request

26. Civil Procedure Law, FBIS-CHI-91-115, *supra* note 9, 92, 112 (14 June 1991) [hereinafter CIVIL PROCEDURE LAW].

27. *See, e.g.*, Case Comment, *Service of Process by Registered Mail on a Japanese Defendant is Ineffective Under Article 10(a) of the Hague Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters,* Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989), 23 VAND. J. TRANSNAT'L L. 851, 859 (1990).

28. See section 1696 of Title 28 of the United States Code, as added in 1964, and section 2.04 of the Uniform Interstate and International Procedure Act, *in* RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 3, § 2-1, at 14 & § 2-3, at 16.

directly to the appropriate U.S. district court asking for service to be ordered in relation to a foreign or international proceeding. Moreover, the United States does not prescribe any particular form for the letter rogatory so long as it includes the necessary information to effect service successfully.

While international judicial assistance through diplomatic channels has the advantage of being safe and reliable, the procedures are complicated and extremely time-consuming. In China, for example, civil cases involving foreign jurisdictions often require service at least three times. First, a copy of the notice of action and the statement of claim must be sent to the foreign party. Second, the first summons must then be sent to the foreign party. Finally, if the foreign party does not reply or make his or her court appearance in time, a second summons must be sent before a default judgment is rendered and served. All in all these processes alone will usually require one year, not including the time for service of the judgment.[29]

B. Service by Post

Service by post of the process of Chinese courts to its nationals abroad was commonly used in civil and commercial cases before 1980, although it has since been restricted to residents in Hong Kong, Macau, and Taiwan.[30] As early as 1955, the Supreme People's Court and the Commission of Overseas Chinese Affairs issued a joint notice outlining the procedure for such service. It stipulated that in divorce cases or other marital disputes, the application for service and the judgment to be so served must be approved by the high people's court and the department of external affairs of the province or municipality[31] before they may be sent abroad. Where China has no diplomatic relations with the foreign country, the document may be mailed by the court directly to the recipient. If, on the other hand, diplomatic relations exist, it must be transmitted through the Chinese embassy or consulate.[32]

Special precautions have, however, been required for service by post to Chinese residents in Hong Kong, Macau, and Taiwan. According to the Nationality Law of the People's Republic of China, China does not recognize dual citizenship, and the Chinese residents in these territories are legally considered PRC

29. *See* Shen Hui, *Service of Documents Abroad in Our Country's Civil Procedure*, FAXUE (LEGAL SCIENCE) 26 (No. 2, 1998).

30. Based on an interview with knowledgeable Chinese officials at the Supreme People's Court and the Ministry of Justice in Aug. of 1991 [hereinafter Interview]. Note: Many of the documents referred to in this article have not been published. The author's awareness of the treaties discussed comes from his interviews with knowledgeable, high-ranking officials from the Chinese Justice Department and the Supreme People's Court. While the documents are not publicly available, the author can confirm their existence and authenticity.

31. The cities of Shanghai, Beijing, and Tianjin are accorded status equivalent to that of the provinces. They have their own high people's courts and departments of external affairs.

32. *Provisional Guidelines Concerning the Delivery of Documents Involving Matrimonial Proceedings by Post to Overseas Chinese Abroad* (5 May 1955), *in* COLLECTION OF NORMATIVE INTERPRETATIONS, *supra* note 18, at 1043–44.

nationals.[33] The Chinese authorities therefore regard cases involving these people as domestic matters. Nevertheless, given the independent status of these territories, the Chinese judiciary is careful not to impinge upon the sensitivities of these territorial authorities. A notice of the Supreme People's Court, in 1956, therefore required that all judicial documents to be delivered to Hong Kong and Macau must use a plain manila envelope showing only the personal name of the judge and the address of the court, instead of the officially addressed envelope.[34] A similar process is used for service of documents to residents in Taiwan.[35] These extra measures are taken in order to avoid objections from the authorities in these territories. As yet there have been no complaints about this practice by these authorities.

Contrary to the judicial practice, article 247(6) of the 1991 Civil Procedure Law, in the same vein as article 196(3) of the old law, broadly permits the use of service by post to persons of any nationality abroad. It states that, "the people's courts may . . . serve . . . documents by mail to litigants who have no residence in the territory of . . . China, provided that the litigant's country of residence so permits."[36] Despite this express legislative authorization, the Supreme People's Court in 1980 ordered that legal documents to be served, even on a Chinese national in Canada, must be submitted by an intermediate people's court to the Consular Affairs Section of the Ministry of Foreign Affairs for transmittal through the Chinese diplomatic or consular mission in the country concerned.[37] This order signaled a drastic change in China's policy on service by post, effectively restricting its use solely to cases involving Chinese nationals residing in Hong Kong, Macau, and Taiwan. The general use of service by post to Chinese nationals abroad, other than in these three territories, has been replaced by consular channels since the 1970s.[38]

While the service of documents, by post, to Chinese nationals abroad is permitted in law, but forbidden in judicial practice, the reciprocal service in China is prohibited outright by the Civil Procedure Law. Based on the principle of reciprocity, it would seem logical that China allow those countries that permit it to serve documents by post, to also serve their documents by the same method in return. To the contrary, article 263 expressly prohibits foreign agencies and individuals from serving documents in China, other than through treaty

33. *See* Tung-Pi Chen, *The Nationality Law of the People's Republic of China and the Overseas Chinese in Hong Kong, Macao and Southeast Asia*, 5 N.Y.L. SCH. J. INT'L & COMP. L. 281, 301–25 (1984).

34. *Notice of the Supreme People's Court Concerning the Handling of Divorce Cases Where One Party Resides in the PRC and the Other in Macau or Hong Kong* (21 July 1956), *in* COLLECTION OF NORMATIVE INTERPRETATIONS, *supra* note 18, at 1045.

35. Interview, *supra* note 30.

36. Civil Procedure Law, *supra* note 26, at 111.

37. *Reply of the Supreme People's Court on the Service of Divorce Documents to Chinese Citizens Residing in Canada* (25 August 1980), *in* HANDBOOK ON FOREIGN CIVIL MATTERS, *supra* note 16, at 165.

38. *See infra* part II.B. for service through consular channels.

arrangements, diplomatic or consular channels, or by special permission.[39] Hence, a country such as the United States, which permits Chinese courts to serve documents by post to parties in the United States[40] is not allowed to use such service in China, regardless of the recipient's nationality. On the one hand, China is convinced that service by post would constitute a violation of its territorial sovereignty and expose it to foreign control. On the other hand, China believes that it is entitled to benefit from the liberality of other countries. These attitudes are perhaps a result of the Chinese leadership's continuing adherence to the nineteenth century view of international relations as a zero-sum game.[41]

The goal of China's policy is therefore to protect national security and independence, not to enhance the notion of interdependence among nations. Hence the doctrine of reciprocity, to which China has so tenaciously adhered in the area of private international law,[42] has failed, to China's benefit.

C. Service by Agent Ad Litem

Given the complex and time-consuming nature of other channels for the service of documents, service by agent has become a general practice in international business transactions. International litigations, moreover, necessitate the engagement of legal counsels who are normally designated as agents for the parties to receive service. Thus article 241 of the new Civil Procedure Law stipulates that, "[w]hen foreign nationals, stateless persons or foreign enterprises or organizations appoint lawyers as agent ad litem to institute or respond to prosecutions in the people's court, they must appoint lawyers of the People's Republic of China."[43] In addition to Chinese lawyers, foreign nationals may also appoint other persons in China to act as their agents ad litem. The expression "other persons in China" applies to either Chinese citizens or foreigners.[44] In a 1985 directive the Supreme People's Court therefore declared that: "If a foreign party to a suit wishes to entrust foreign citizens of his own country residing in China as his agent ad litem in a lawsuit, it shall be allowed so long as it does not violate the provisions of China's Civil Procedure Law."[45] The directive also

39. Civil Procedure Law, *supra* note 26, at 112. The doctrine of reciprocity in service of documents contained in art. 262 involves mutual assistance between Chinese and foreign courts but not service by post, a unilateral action ordered by the court of only one country.

40. *See* Ristau, International Judicial Assistance, *supra* note 3, § 2-17, at 25.

41. For the Chinese leadership's world view, see Michel Oksenberg, The China Problem, Foreign Affairs, Summer 1991 at 1, 10.

42. *See* Tung-Pi Chen, *Private International Law of the People's Republic of China: An Overview*, 35 Am. J. of Comp. L. 445, 456–58 (1987).

43. Civil Procedure Law, *supra* note 26, at 110.

44. Interview, *supra* note 30.

45. *Reply of the Supreme People's Court to the Question of Whether Foreign Citizens Residing in China or Personnel of a Foreign Consulate May Be Entrusted as Agents Ad Litem in a Lawsuit (Reply to the Higher People's Court of Shanghai Municipality (8 June 1985) in* China L. Y.B. 1987: First Eng. Edition 417 (1989) [hereinafter China L. Y.B. 1987]. See the Chinese original *in* Collection of the Laws of the People's Republic of China 461 (Wong Huai et al. eds., 1989) [hereinafter Collection of Laws].

stated that: "When officials of the foreign embassies and consulates in China are entrusted by their nationals to function in their own names as the latter's agent ad litem in lawsuits, it shall also be allowed."[46]

In accordance with article 5(i) of the Vienna Convention on Consular Relations,[47] to which China is a party, the Supreme People's Court further affirmed that foreign consular officials in China,

> including diplomats of foreign embassies with consular status confirmed by the Chinese Foreign Affairs Ministry, may, without being entrusted, also appear in Chinese courts as representatives of, or make arrangements to engage representatives for, citizens of their own country when they are parties to a lawsuit and are not in this country or cannot appear in the Chinese courts at the stipulated time because of other reasons.[48]

As can be seen from above, Chinese law provides a wide range of options for the appointment of an agent ad litem in international litigation in China, ranging from a Chinese lawyer to a fellow foreign national, and these appointments must normally be unequivocal. When an agency agreement is signed, the rights and obligations between the parties including the powers of the agent, must, of course, be stated explicitly—one of the standard terms being the agent's authority to receive service of litigation documents. Thus, where the documents have been served to the agent, the principal concerned shall be deemed to have been served as well; the principal has no alternative but to recognize documents that have been served on the agent.

Service through appointed agents has become an important means of serving documents in international litigation for its simplicity, reliability, and general recognition and approval in common law countries. As well, article 247(4) of China's new Civil Procedure Law has also recognized the practice by declaring that "service may be done through the party's agent ad litem when the party does not reside in the People's Republic of China."[49]

In addition to service through an entrusted agent, the Chinese court system has expanded the practice to include a wide range of informal, alternative methods of serving documents abroad, including: First, when only the plaintiff has a legal representative in the litigation, the court may ask the representative to serve documents to the defendant abroad; second, the court may ask defendants in China to serve documents on codefendants abroad; third, the court may ask friends and relatives in China to serve documents on parties residing abroad; and finally, the court may also ask Chinese commercial representatives or "patriotic" overseas Chinese nongovernmental organizations abroad to serve documents on parties living in foreign countries.[50]

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46. *Id.*

47. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, (entered into force in China on Aug. 1, 1979). CHINA L. Y.B. 1987, *supra* note 45, at 378.

48. CHINA L. Y.B. 1987, *supra* note 45, at 417.

49. Civil Procedure Law, *supra* note 26, at 111.

50. Shen Hui, *Our Country's Service of Judicial Documents Abroad in Civil Matters,* FAXUE (LEGAL SCIENCE) 26, 29 (No. 2, 1988).

The above methods of service are used only when the judge is confident that the Chinese parties are in a relationship of harmony and trust. The willingness of the courts to entrust matters involving Chinese persons to informal mechanisms is indicative of the strong allegiance overseas Chinese feel to their homeland and the close connections they preserve with friends and relatives in China.

More importantly, the above informal methods of service are used mainly in civil and commercial cases involving Hong Kong, Macau, and Taiwan. In such cases, the court would generally require that the parties provide their addresses in full and agree on a specific mode of service. The court may, in the alternative, appoint or require the parties to designate a friend, relative, or legal representative in China to receive service of documents. For example, in 1956 the Supreme People's Court ruled that in a divorce case when one party resides in China and the other in Hong Kong or Macau, and if the party in China has engaged a Chinese lawyer, the lawyer may in his professional capacity correspond with the other party to inquire about his or her opinion regarding the case.[51]

These informalities have also been extended to cases involving Chinese co-plaintiffs or defendants where the court may require a plaintiff or defendant to forward documents to his or her fellow litigants. For example, the Local People's Court of the Dong Cheng District of Beijing was seized with the inheritance case of *Yuan Hui et al. v. Yuan Xing Jian* in 1984, which involved third-party beneficiaries residing in Taiwan.[52] The Supreme People's Court directed that the plaintiffs join the defendants to forward the judicial documents on behalf of the court to the surviving third-party beneficiaries in Taiwan. Likewise, in the divorce case of *Lin Xian Shun v. Chen Xue Zhen* in 1991, the Intermediate People's Court of Shi Jia Zhuang, in Hubei Province, asked the relatives of the defendant, Mrs. Chen Xue Zhen, and her lawyers in China to forward judicial documents to her in Taiwan where she was residing at the time.[53]

The overriding concern with informal methods is to render service on Chinese parties abroad as quickly and as effectively as possible so that the service could neither be ignored nor refused, and delays in court proceedings avoided. Whether a default judgment rendered through such methods would be considered fair procedure, and whether it would be recognizable and enforceable according to the law of Hong Kong, Macau, and Taiwan is questionable.

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51. COLLECTION OF NORMATIVE INTERPRETATIONS, *supra* note 18.

52. *Opinion of the Supreme Court on Whether the Right of Inheritance Should Be Protected When the Successor Is Residing in Taiwan* in *id.* at 1252.

53. Interview, *supra* note 30. This case represents the first instance of a Taiwanese citizen applying to have a legal matter settled in China. The plaintiff was a pilot in Taiwan's air force, who defected to China and became a senior officer in Hubei Province's Air Force Academy. In July of 1989, he sued for divorce from his wife, who was still residing in Taiwan; but she refused to divorce him and sent two Taiwanese lawyers to China to act as her agents. The court ruled in her favor. However, under Chinese law, if a petition for divorce is rejected, it can be filed again after six months. On the second try, the court acceded to the husband's wishes and granted the divorce. *See Upon the Insistence of Lin Xian Shun, Chen Xue Zhen Agreed to Divorce,* THE SHIJIE RIBAO [WORLD DAILY NEWS], Mar. 8, 1991, at 15.

D. Service by Public Notice

Where a detailed address of a party abroad is unknown or when the above methods of service are impractical, service by public notice provides Chinese courts with a means of last recourse.[54] In China public notice consists of a published announcement in the print media or other suitable place. After six months from the date of posting, the document is deemed to have been served.[55] In case of a default judgment, the Supreme People's Court declared in 1983 that:

> If a defendant in a civil case residing abroad makes no reply to a notice of action served on him by public notice, the people's court may after six months make a default judgment which shall further be served by public notice in accordance with article 196(6) of the [old] Civil Procedure Law. The judgment shall become legally effective only on the expiration of the six-month period, or 60-day period if the defendant failed to file an appeal.[56]

In practice, public notice is usually published in an appropriate newspaper, such as the *People's Daily (Overseas Edition),* the *China Legal System Daily (Zhongguo Fajih Bao),* or a local newspaper. Public notice may also be posted on the notice board of the local court. These two means of notification—publication and posting—are typically done together and are similar to the procedures of last resort used in western countries.[57]

Service through public notice is also used in cases related to the territories of Hong Kong, Macau, and Taiwan. The difference between these cases and those involving foreign countries is the time limit. Because cases involving these areas are deemed domestic matters, the time limit is not the six months allowed foreign cases, but is the same as the period allowed domestic ones: three months from the date of the public notice.[58]

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54. Article 247(7) of the new Civil Procedure Law states that, "where documents cannot be served by the aforesaid means, they shall be served by a public notice." Civil Procedure Law, *supra* note 26, at 111.

55. *Id.*

56. *Reply by the Supreme People's Court Regarding the Requirement of Public Notice of a Default Civil Judgment Involving a Defendant Residing Abroad Who Failed to Answer a Notice of Action Served by Public Notice* (7 Feb. 1983), in Handbook on Foreign Civil Matters, *supra* note 16, at 171.

57. In the United States, the Federal Rules of Civil Procedure 4(i)(1)(E) and the Uniform Interstate and International Procedure Act, § 2.01(5) allow for service as directed by the court which may include service by public notice or publication. Ristau, International Judicial Assistance, *supra* note 3, § 3-2, at 54 & § 3-4, at 60. The same is true in Canada. *See* External Affairs, Government of Canada, International Judicial Co-Operation 7 (1987) [hereinafter External Affairs]; *see also* Hague Service Convention, *supra* note 6, art. 19, (permitting service by any method sanctioned by the internal law of the receiving country). In this context, publication of notice is usually only permitted where the address of the party to be served is unknown.

58. *Opinions of the Supreme People's Court on the Civil Procedure Law (for Trial Implementation)* (30 Aug. 1984), China L. Y.B. 1987, *supra* note 45, at 403. *See* Collection of Laws, *supra* note 45, at 406, 411, (Chinese original).

E. Service by Substitution

Due to the increasing globalization of economic activities and the continuing development of transnational corporations, service on a domestic affiliate in substitution of a foreign controlling company has also become an important device for the delivery of documents. This practice is not peculiar to China, but is widely used, especially by common law countries.[59] In American legal practice, for instance, a document served on a subsidiary is deemed to have been effectively served on its parent company.[60]

With China's open policy, there has been a rapid growth of foreign subsidiaries, as well as an increase in the number of branch and representative offices established in China. Service on these offices is uncomplicated and has thus been adopted by the new Civil Procedure Law as an effective tool in international litigation. Article 247(5) of the law states that documents may be "served on the representative office, as well as subsidiary company or business agent duly authorized to receive service."[61] In practice, however, subsidiaries frequently refuse to accept service on behalf of the parent company on the pretext that they have not been legally empowered to do otherwise. In such cases, implying agency depends on several factors: First, whether the subsidiary exists predominantly to promote the sale and distribution of the parent corporation's products; second, whether there are strict or exclusive distributing agreements between the two corporations; and third, whether there are interlocking directorates through which the parent corporation dominates the subsidiary.[62]

F. The Taking of Evidence

In the absence of specific treaty provisions, China would probably be reluctant to request or provide judicial assistance for the taking of evidence. China's old Civil Procedure Law of 1982 contained only general provisions that could be interpreted to include the taking of evidence under the vague term "certain litigation actions."[63] However, in 1986, the joint notice of the Supreme People's Court and the Ministries of Foreign Affairs and Justice clarified that these pro-

59. For example, in the United States procedures for foreign service upon a domestic corporation, partnership or an unincorporated association which is subject to suit are provided by the Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-486, 96 Stat. 2529 (amending Rule 4(g) and adding new Rule 4(d)). Ristau, International Judicial Assistance, *supra* note 3, § 2-18, at 29 n.7. Similarly Rule 4(i)(1)(C) of the Federal Rule of Civil Procedure provides for the service of American documents abroad upon a corporation or partnership or association. *Id.* § 3-2, at 54.

60. In Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 707 (1988), the U.S. Supreme Court definitively stated that service on one of a company's wholly owned subsidiaries constitutes valid domestic service on an agent for the company.

61. Civil Procedure Law, *supra* note 26, at 111.

62. Kenneth C. Miller & Nancy Pionk, *The Practical Aspects of Litigating Against Foreign Corporations*, 54 J. Air L. & Com. 123, 125–26 (1988).

63. *See* old Civil Procedure Law, *supra* note 2, arts. 202, 205.

visions did indeed apply to the taking of evidence. The joint notice declared: "8. In rendering mutual assistance in the taking of evidence between our court and foreign courts, the above procedures [on judicial assistance through diplomatic channels] may be applied by analogy."[64]

This was reaffirmed by article 262 of the new Civil Procedure Law in 1991 which reads:

> In accordance with the international treaties signed or joined by the PRC, or the principle of reciprocity, a people's court and its foreign counterpart may request each other to assist in . . . collecting evidence, ...
>
> A people's court shall not handle a case requested by a foreign court, if the case in question undermines the PRC's sovereignty, security, or social and public interests.[65]

Furthermore, article 263 states that "diplomatic channels shall be pursued in cases where there are no treaties."[66] Thus judicial assistance in the taking of evidence is permitted, based on the principle of reciprocity, through diplomatic channels when treaty obligations do not exist.

This approach poses a problem for foreign courts that require assistance from China for the first time. Due to China's steadfast adherence to the doctrine of reciprocity, a foreign court would first have to demonstrate its ability and willingness to provide similar assistance in the reverse situation. Even if the precondition of demonstrating the existence of reciprocity can be found in the practices of other countries,[67] China's century-old distrust of foreigners, cautiousness in dealing with foreign matters, and the judiciary's unfamiliarity with foreign laws could mean that no mere promise of reciprocity would succeed. For a request for the taking of evidence from a nontreaty state to be acceptable, the Chinese authorities would probably require concrete evidence of that country's past assistance to China. Since China, to date, has never made such a request,[68] it is unlikely that China will provide its assistance to any country.

Moreover, due to China's age-old politicization of its judicial process, the acceptance of any proof of reciprocity may depend on its internal policies and the diplomatic climate between the countries concerned at the time. In the immediate aftermath of the Tiananmen Square crackdown, for example, Chinese leaders felt a renewed sense that the West was attempting to subvert their rule by encouraging "bourgeois liberal" dissent.[69] In such an atmosphere of suspicion and animosity, reciprocal responses by the Chinese judiciary to international initiatives would likely be remote. Furthermore, the grounds on which the Chinese

64. Delivery of Legal Documents, *supra* note 24.

65. Civil Procedure Law, *supra* note 26, at 112.

66. *Id.*

67. U.S. law does not require proof of reciprocity, however, since the decision to execute a foreign letter of request is left up to the discretion of U.S. courts in the absence of any relevant treaty, Bruno Ristau suggests that the existence of reciprocal practice might positively influence the courts. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 3, § 2-34, at 45.

68. Interview, *supra* note 30.

69. Oksenberg, *supra* note 41, at 11.

judiciary may refuse to grant assistance are extremely general and vague. The boilerplate clause in article 262 allows China to refuse to grant assistance if the request is incompatible with the "sovereignty or security" of the country. What might be deemed incompatible has never been defined and is capable of broad interpretation. If the Chinese judiciary decides not to honor a request for assistance, it does not have to look far for a ready-made excuse.

In the absence of treaty obligations or clear legislation, the Chinese judiciary probably will not show the creativity and initiative necessary to generate procedures for the taking of evidence. Nonetheless, the factors most likely to determine the courts' decision are the novelty of the request (that is, whether a similar request by China has been honored before), evidence of past reciprocal practices, the political climate between the countries, and China's internal policies at the time.[70]

II. International Judicial Assistance with Treaty States

Although China's judicial assistance for the present is based largely on domestic law and carried out through diplomatic channels, treaties are becoming increasingly significant. China has participated in consular treaties, judicial assistance conventions, and also some multilateral agreements that have judicial assistance provisions. Up until 1990, China had concluded seventeen consular treaties[71] and acceded to the Vienna Convention on Consular Relations.[72] These treaties all contain brief articles on the service of documents and, occasionally, the taking of evidence. The PRC did not, however, begin negotiating judicial assistance treaties until the mid-1980s, taking as its blueprint the practice of the international community and its own experience. Although the events of Tiananmen Square in 1989 hampered such negotiations, there has been a recent resurgence of political will to continue the efforts in this area. By the end of 1991, China had concluded judicial assistance treaties with France,[73] Poland,[74] and Mongolia;[75] signed treaties with Belgium, Romania, East Germany, and Italy;[76]

70. Interview, *supra* note 30.

71. Based on a survey by the author from ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN [COLLECTION OF LAWS AND DECREES OF THE CENTRAL PEOPLE'S GOVERNMENT] 1949–1954 (2d ed. 1982); ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN [COLLECTION OF LAWS AND REGULATIONS OF THE PRC] 1954–1989; ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO (GAZETTE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA) 1980–1990 [hereinafter THE STATE COUNCIL GAZETTE].

72. Vienna Convention on Consular Relations, *supra* note 47.

73. The Convention on Reciprocal Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the Republic of France, P.R.C.-Fr., *in* THE STATE COUNCIL GAZETTE, *supra* note 71, Apr. 15, 1988, at 228 [hereinafter Sino-French Treaty].

74. The Convention on Reciprocal Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and the People's Republic of Poland, P.R.C.-Pol., *in id.*, May 5, 1988, at 260 [hereinafter Sino-Polish Treaty].

75. The Convention on Reciprocal Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and the People's Republic of Mongolia, P.R.C.-Mong., *in id.* (Sept. 29, 1990) at 651 [hereinafter Sino-Mongolian Treaty].

76. Interview, *supra* note 30.

and initialed treaties with Turkey, Cuba, and the USSR.[77] Last but not least, China has acceded to the 1965 Hague Service Convention,[78] which currently has around thirty members.[79] These treaties will have a far-reaching impact on China's international judicial assistance scheme.

Based on the treaties signed by China, judicial assistance includes the service and transmission of judicial and extrajudicial documents; taking of evidence; recognition and enforcement of civil and commercial judgments and arbitral awards; and the exchange of legal information. The scope of particular judicial assistance treaties, however, varies greatly. For example, the Sino-Belgian and Sino-French treaties are limited to civil affairs, including marriage, commerce, and labor, as well as the recognition and enforcement of arbitral awards, but not of judicial judgments.[80] By contrast, the scope of the treaties with Turkey and China's five-fellow or ex-fellow communist countries is much broader. It encompasses criminal matters in addition to civil and commercial affairs, as well as the recognition and enforcement of both judicial judgments and arbitral awards.[81]

China's bilateral judicial assistance treaties stipulate, without exception, that assistance be carried out between central authorities designated by the signatory states.[82] The Ministry of Justice has been designated as China's central authority and a distinct bureau within the ministry was created for the task of international judicial assistance.[83]

The use of a central authority as a conduit for China's judicial assistance is based largely on the Hague Service Convention[84] and the Hague Evidence Convention.[85] It is designed to accelerate the process of assistance by avoiding the cumbersome and time-consuming diplomatic or consular channels. Including China, this method is quickly becoming standard practice throughout the world.

77. As of the end of 1991, China is also known to be negotiating with Spain for a judicial assistance treaty. *Id.*

78. *See* Decision of the Standing Committee of the National People's Congress on Approving China's Acceding to The Convention Concerning Sending Abroad Civilian or Commercial Judicial Documents and Unjudicial Documents, *in* THE STATE COUNCIL GAZETTE, *supra* note 71, Apr. 15, 1991, at 213 [hereinafter China's Ratification of the Hague Service Convention].

79. Interview, *supra* note 30.

80. Sino-French treaty, *supra* note 73; Interview, *supra* note 30.

81. See the Sino-Polish, *supra* note 74, and Sino-German treaties (no article specifying the scope) as well as arts. 11 & 23 of the Sino-Mongolian treaty, *supra* note 75, defining its scope in civil and commercial matters, and criminal matters, respectively.

82. Provisions stipulating the use of central authorities can be found in art. 3(1) of the Sino-Belgian, Sino-French, *supra* note 73, Sino-German, and Sino-Mongolian, *supra* note 75, judicial assistance treaties, as well as art. 6(1) of the Sino-Polish treaty, *supra* note 76.

83. *See Report on the Work of Judicial Administration (1987),* 1988 in ZHONGGUO FALU NIANJIAN [LAW Y.B. OF CHINA] 24, 31 (1989); *and* China's Ratification of the Hague Service Convention, *supra* note 78.

84. Hague Service Convention, *supra* note 6, art. 2.

85. Hague Evidence Convention, *supra* note 6, art. 2.

A. Service of Documents through Central Authorities

China's judicial assistance treaties invariably contain the same basic methods for the service of documents. The letter rogatory requesting the service of the judicial and extrajudicial documents must be submitted by the requesting state's central authority, or consulate in the case of the Hague Service Convention,[86] to that of the requested country. The form of the letter rogatory and the language to be used are stipulated in the appendices of the treaties. Typically, the letter rogatory must be written in the official language of the requesting party and accompanied by a translation in the counterpart's language.[87]

Since the treaties do not prescribe detailed procedures to effect service, the central authority of the requested party chooses the appropriate methods according to its domestic law.[88] If, however, the address of the person on whom a document is to be served is unclear or incomplete, the requested central authority may ask for further information. If the address remains unclear and the document is incapable of being served, the central authority should notify its counterpart and return all documents.

A receipt is required for every document served, and, it must bear the addressee's signature and the date of receipt. Moreover, the central authority must record the method of service, the place, and the date on the receipt. A request for judicial assistance, including the service of documents, may be refused if the request is contrary to the sovereignty, national security, or *ordre public* of the requested state. The requested state is, however, obligated to provide the requesting country with an explanation for the refusal.

There have been, to date, reports of successful cooperation in implementing the procedures for the service of documents.[89] For example, in an indemnity case[90] involving the shipment of frozen shrimp from China to the plaintiff in France, the French Ministry of Justice, in accordance with the Sino-French judicial assistance treaty, requested its Chinese counterpart in 1989 to serve a summons issued by the Commercial Court of Marseilles on the Chinese defendant. The Chinese Ministry of Justice is reported to have complied fully with this request. An example of assistance in the reverse situation can be found the following year in a divorce case where the relevant documents issued by the

86. Hague Service Convention, *supra* note 6, art. 9.

87. For example, art. 6 of the Sino-French treaty, *supra* note 73, stipulates that all judicial and extrajudicial documents shall include a copy and a translation in the counterpart's language. Arts. 8 & 8(1) of the Sino-Polish, *supra* note 74, and Sino-Mongolian, *supra* note 75, treaties, respectively, stipulate that judicial assistance applications should include either a translation in the language of the requested country or in English.

88. Sino-French treaty, *supra* note 73, art. 7; Sino-Mongolian treaty, *supra* note 75, art. 10.

89. Interview, *supra* note 31.

90. Branch of Concord Transp. Co. v. Qingdao Branch of the People's Ins. Co. of China. Interview, *supra* note 30.

Guangdong Intermediate People's Court were served on the defendant in France.[91]

The implementation of Chinese judicial assistance treaties, although receiving full cooperation from the signatories, has failed to simplify the procedures for service. The design of central authorities was originally intended to provide consistent, expeditious, and reliable service of process abroad. However, by designating the Ministry of Justice as the central authority while also requiring that applications for foreign judicial assistance be approved and referred by the Supreme People's Court, Chinese letters rogatory to be transmitted abroad now have to go through four levels of domestic bureaucracy: the Central Authority in the Ministry of Justice; the Supreme People's Court; the High People's Court; and the appropriate Intermediate People's Court. Rather than conduct service through diplomatic channels,[92] this requires one more level of bureaucracy. Jealousy and competition between the different branches of China's bureaucracy for the prestige and perks associated with jurisdiction over foreign matters have resulted in a division of authority between the Supreme People's Court and the Ministry of Justice that has encumbered an otherwise well-designed scheme. Nonetheless, it is said that service through a central authority in China can be completed within one month—an efficient process by any standard.

B. Service through Consular Channels

Chinese consular channels have become a readily available and attractive method of service during the last two decades. Since joining the United Nations in 1971, China's diplomatic relations with foreign countries have expanded rapidly. The number of Chinese consulates abroad has consequently multiplied, making service through consular channels more accessible. Moreover, since the service process throughout is conducted by Chinese officials, no translation is required. In addition, it involves at least one less level of bureaucracy abroad than service through diplomatic channels.[93]

The PRC's international legal right to use consular channels for the service of documents abroad is traditionally derived from the consular treaties, including the Vienna Convention on Consular Relations,[94] and recently from some of the judicial assistance treaties it has concluded and the Hague Service Convention.[95]

91. Huang Ai Zhen v. Wen Guang Xiong. Interview, *supra* note 30.

92. Diplomatic channels require documents to go through only the Intermediate People's Court, the High People's Court and the Ministry of Foreign Affairs before being transmitted abroad. *See supra* note 24 and accompanying text.

93. Cf. *id.* Service of Chinese documents abroad by diplomatic channels involves at least the foreign country's ministry of foreign affairs and the relevant court. Whereas, service by consular channels involves only the transmission of the documents to China's consulate abroad.

94. Vienna Convention on Consular Relations, *supra* note 47.

95. *See* Sino-Belgian treaty, art. 11(1), and Sino-French treaty, *supra* note 73, art. 7(2); *see also* Hague Service Convention, *supra* note 6, art. 8.

The judicial assistance treaties, both bilateral and the Hague Service Convention, authorize consulates to serve documents abroad, but restrict service to the nationals of the sending country.[96]

Likewise, service of documents under China's consular treaties is limited to nationals of the requesting country, except only for the Sino-Czech treaty.[97] While some of these consular treaties explicitly restrict service,[98] others do so indirectly by subjecting the service to the prohibitive law of the receiving state.[99] China's Civil Procedure Law states that "[f]oreign embassies and consulates in the PRC may serve documents on . . . [only] their own nationals"[100] and that Chinese documents may be served abroad "where the litigants are of Chinese nationality."[101] Consular service between China and other countries is thus normally permitted on only the nationals of the sending state. The restriction reveals again the country's sensitivity toward its sovereign integrity.

C. Taking of Evidence

Judicial assistance in the taking of evidence is an underdeveloped area of China's domestic[102] and treaty law. There are, however, indications of promising developments through treaty arrangements. As with the service of documents, there are two sources of treaty procedures for the taking of evidence: consular treaties, including the Vienna Convention, and judicial assistance treaties.

The provisions of China's judicial assistance treaties on the taking of evidence vary greatly in their comprehensiveness. The scope of the treaties include, at a minimum: receiving testimony from litigants, witnesses, and experts; examining

96. *See supra* note 95. *See also* China's Ratification of the Hague Service Convention, *supra* note 78. Based on art. 8(2) of the Hague Service Convention, China made a reservation regarding art. 8(1)—service by consulate channels—restricting service to nationals of the sending state.

97. *See* Sino-Czech treaty, art. 23, State Council Bull. No. 14, Aug. 15, 1989, at 547.

98. For example, the Sino-Yugoslavian treaty, art. 23, State Council Bull. No. 17, Dec. 10, 1982, at 752, states that "the consular official may serve . . . documents *to the nationals of the sending state*" (emphasis added); *see also* Sino-Italian treaty, art. 22, State Council Bull. No. 11, May 15, 1987, at 371; Sino-Bulgarian treaty, art. 15, State Council Bull. No. 4, July 25, 1987, at 245; Sino-Korean treaty, art. 21, State Council Bull. No. 8, April 10, 1986, at 202; Sino-Turkish treaty, art. 26, State Council Bull. No. 12, July 18, 1990, at 420; Sino-Iraqi treaty, State Council Bull. No. 17, Sept. 29, 1990, at 637; Sino-Polish treaty, *supra* note 74, art. 20; Sino-German treaty, art. 42.

99. For example, the Consular Convention on Consular Relations, Sept. 17, 1980, U.S.-China, art. 29, 33 U.S.T. 2973 [hereinafter Sino-American Consular Convention] states that, "A consular officer shall be entitled to serve judicial and other legal documents in accordance with international agreements in force between the sending and receiving States, or, in the absence of such agreements, *to the extent permitted by the law of the receiving State.*" (emphasis added) See also, art. 5(j) of the Vienna Convention on Consular Relations, *supra* note 47, which broadly states that consular functions consist in "transmitting judicial and extra-judicial documents or executing letters rogatory . . . for the courts of the sending state in accordance with international agreements in force or, in the absence of such international agreements, *in any other manner compatible with the laws and regulations of the receiving State* (emphasis added).

100. Civil Procedure Law, *supra* note 26, art. 263, para. 2, at 112.

101. *Id.*, art. 247(3), at 111.

102. *See supra* part I.F.

material evidence; and surveying the actual site. Some treaty provisions, such as those of the Sino-Polish and Sino-Belgian treaties, deal with the service of documents and the taking of evidence together; thus, the procedures are perfunctory. Others, however, have separate and relatively sophisticated articles on the taking of evidence. The Sino-French treaty, for example, contains an article stipulating that, "where necessary, compulsion may be used in accordance with domestic law."[103] This is an important proviso since requiring witnesses to provide evidence frequently involves the curtailment of their personal rights. Without the authority to coerce witnesses into giving testimony, procedures on the taking of evidence are of little value. However, by restricting the use of compulsion to the purview of domestic law, the procedures also protect the independent sovereignty of the requested state. In this respect the Sino-French treaty is identical to the Hague Evidence Convention;[104] in all others it is considerably narrower. Article 17 of the Hague Convention, for example, empowers requesting countries to appoint commissioners to take evidence in foreign Member States. None of China's treaties contains any such broad provisions.

The procedures for the taking of evidence in China's consular treaties are even more limited than those in its judicial assistance treaties. Most of China's consular treaties contain only vague provisions allowing the performance of any acts that are not contrary to the domestic laws of the requested country.[105] Some of the treaties, however, contain specific provisions related to notarial functions (Poland,[106] Democratic Republic of Korea,[107] Italy, [108] Czechoslovakia,[109] Turkey,[110] Laos,[111] Iraq,[112] and the United States[113]), which permit the passive

103. Sino-French treaty, *supra* note 73, art. 14.

104. Art. 10 of the Hague Evidence Convention, *supra* note 16, states that:

> In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

105. For example, art. 5(m) of the Vienna Convention on Consular Relations, *supra* note 47, states that consular functions consist in:

> performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving state.

106. Consular Treaty Between the People's Republic of China and the People's Republic of Poland, P.R.C.-Pol., arts. 14, 20, *in* THE STATE COUNCIL GAZETTE, *supra* note 71, Oct. 20, 1984, 552, 567.

107. Consular Treaty Between the People's Republic of China and the Republic of Korea, P.R.C.-Korea, arts. 10,21, *in id.* Apr. 10, 1986, 202, 206, 211.

108. Consular Treaty Between the People's Republic of China and the Republic of Italy, P.R.C.-Italy, arts. 10, 22, *in id.* May 15, 1987, 371, 383.

109. Consular Treaty Between the People's Republic of China and the Socialist Republic of Czechoslovakia, P.R.C.-Czech., arts. 13, 23, *in id.* Aug. 15, 1989, 547, 552, 556 [hereinafter Sino-Czech. Consular Treaty].

110. Consular Treaty between the People's Republic of China and the Republic of Turkey, P.R.C.-Turk., arts. 12, 26, *in* THE BULL. OF THE STANDING COMMITTEE OF THE NAT'L PEOPLE'S CONGRESS, Dec. 31, 1989, 484, 489, 495.

111. Consular Treaty Between the People's Republic of China and the Democratic Republic of Laos, P.R.C.-Laos, arts. 12, 22, *in* THE STATE COUNCIL GAZETTE, *supra* note 71, Sept. 29, 1990, 623, 626 [hereinafter Sino-Laos Consular Treaty].

reception of evidence by consular officials. And of these, only the Czechoslovakian,[114] Laotian,[115] and U.S.[116] consular treaties allow officials to receive evidence from non-nationals. None of the treaties sanctions the use of coercion to obtain testimony.

D. Exchange of Legal Information

Knowing and proving the law and judicial practice of a foreign country is an essential part of international litigation. That all of China's judicial assistance treaties should include provisions on the exchange of legal information is therefore unremarkable. These provisions provide that the central authorities of both signatories should provide all information about their country's laws and judicial practices in civil affairs, as well as all other relevant legal information. The courts may also request copies of judicial decisions from their counterparts, free of charge. In addition, the treaties also provide for the exchange of all relevant legal publications.[117] For China, where foreign legal expertise is rare and would be extremely expensive to obtain through normal means, these provisions are invaluable.

E. Judicial Assistance on Criminal Matters

International judicial assistance on criminal matters has become an indispensable element of China's administration of justice. Although historically, judicial assistance in China was limited to civil and commercial matters, the PRC's open policy since the late 1970s has sharply increased the interactions between Chinese and foreigners. This, in turn, has resulted in an exponential increase in international and interregional crimes involving Chinese citizens.

One source of assistance in criminal matters is China's judicial assistance treaties with fellow or ex-fellow communist countries like Poland, the Democratic Republic of Germany, and Mongolia.[118] China has, however, also recently negotiated criminal assistance arrangements with Turkey, a noncommunist coun-

112. Consular Treaty Between the People's Republic of China and the Republic of Iraq, P.R.C.-Iraq, arts. 11, 22, *in id.* Sept. 29, 1990, 637, 641, 645.

113. For example, art. 27(1) of the Sino-American Consular Convention, *supra* note 99, states that a consular officer is entitled to "receive and witness statements made under oath or affirmation, and, in accordance with the law of the receiving State, to receive the testimony of any person for use in connection with a legal proceeding in the sending State." *Reprinted in* LAW ANNUAL REPORT OF CHINA 1982/3, at 454, 459 (Editorial Committee of the Law Annual Report of China ed., 1982).

114. *See* Sino-Czech Consular Treaty, *supra* note 109, art. 13.

115. *See* Sino-Laos Consular Treaty, *supra* note 111, art. 12.

116. *See* Sino-American Consular Convention, *supra* note 99, art. 27.

117. Sino-Belgian treaty, art. 14; Sino-French treaty, *supra* note 73, art. 27; Sino-Polish treaty, *supra* note 74, art. 16; *and* Sino-Mongolian treaty, *supra* note 75, art. 29.

118. For example, art. 22 of the Sino-Polish treaty, *supra* note 74, asserts that: "In criminal matters, each Contracting State shall, on request: deliver judicial and non-judicial documents; take statements from party or parties concerned, as well as the suspect(s); interrogate witnesses, victims, and experts; undertake authentication and conduct judicial inspections in situ; and collect other evidence."

try.[119] All of these require that applications for assistance include an explanation of the material facts and applicable laws.[120] The requested state may nevertheless refuse to provide judicial assistance if the conduct in the application does not constitute a criminal offense in the requested country; if the charge upon which the request is based is political or military in nature; or if the suspect or the accused is a national of the requested country, but is not currently within the jurisdiction of the requesting state.[121]

Another source of assistance in criminal matters is found in the multilateral agreements that China has joined. One is the International Police Organization, "Interpol," which China joined in 1984.[122] Under the agreement, China designated the Ministry of Public Security as its central office. If China wishes to initiate extradition proceedings, but the exact location of the criminal is unknown, the local public security office concerned may send the relevant information to the Chinese central office which, in turn, forwards the information to Interpol's General Secretariat in Paris where it is disseminated to all Member States. If a suspect is found in a Member Country, the authorities concerned may arrest him or her temporarily in accordance with domestic law, and then notify the Chinese central office, which may make an official application for extradition through traditional diplomatic channels.[123] To date, China has successfully extradited several criminals who escaped abroad. Sang Ji Hui, for instance, a former English language translator who worked for the Road and Bridge Construction Company, Sichuan Branch, absconded with U.S. $100,000 while working abroad. He was eventually captured in Colombia and returned to China eight months later in accordance with the above procedures.[124]

China has also joined several other multilateral conventions for cooperation in punishing international criminals.[125] To implement these treaties, the Standing Committee of the National People's Congress declared in 1987 that China has

119. Interview, *supra* note 30.

120. *E.g.*, Sino-Polish treaty, *supra* note 74, art. 7(2).

121. *See id.* art. 20. *See generally* Zou De Ci, Judicial Assistance in China (paper given at The World Peace through Law Conference Beijing Apr. 1990) (on file with the author).

122. CHINA L. Y.B. 1987, *supra* note 45, at 377.

123. ZHONGGUO FAJIH BAO [THE LEGAL SYSTEM DAILY], Sept. 15, 1990, at 4.

124. *Id.*

125. For example, on Aug. 22, 1985, China joined the Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204, as amended by the Protocol of Mar. 25, 1972 amending the Single Convention on Narcotic Drugs. China has also acceded to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, U.N.G.A. Res. 3166 (XXVIII), 28 U.N.G.A.O.R. Supp. (No. 30), at 146, U.N.Doc. A/9030, 28 U.S.T. 1975, T.I.A.S. No. 8532; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U.S.T. 1641, International Civil Aviation Organization [I.C.A.O.] Doc. No. 8920 (1971) (entered into force in China on Oct. 10, 1980); the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 24 U.S.T. 564, I.C.A.O. Doc. No. 8966 (entered into force in China on Oct. 10, 1980); the Convention on Offences and Certain other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

jurisdiction not only in criminal offenses stipulated by domestic laws, but also those that fall under the conventions that China originally signed or has acceded to subsequently.[126]

Although China's participation in bilateral assistance treaties and multilateral conventions on criminal matters is increasing, none has the scope or breadth of those signed by other countries. The scope in China's assistance treaties covers only trial and pretrial proceedings of the delivery of documents and taking of evidence.[127] It does not include extradition which is commonly found in the treaties between its fellow or ex-fellow communist countries,[128] or transfer of persons in custody as in the United States-Canada Treaty on Mutual Legal Assistance in Criminal Matters.[129] The scope of multilateral conventions that China has joined is equally narrow. They do not extend to the transfer of criminal jurisdictions or the execution of criminal judgments as found in European conventions.[130] The one exception to this general pattern is the Sino-Turkish treaty, which includes provisions concerning the transfer of criminal proceedings.[131]

III. Conclusion

To lead it into the interdependent world of the twenty-first century, China needs an efficient and progressive regime of international judicial assistance. In the past few years it has, despite the uncertainty of the political atmosphere, demonstrated an impressive effort in making treaty arrangements and has designed a reasonably complete and forward-looking legislative framework. Nevertheless, this progressive urge to participate in a new international legal order is counterbalanced by China's anxiety for its sovereign integrity, its fear of exploitation by foreign powers, and the ineptitude of its bureaucracy, especially the judiciary.

In treaty-making, China has recently negotiated ten bilateral judicial assistance treaties, three of which are now in force. Of greater impact is China's recent "great leap forward" in participating in the Hague Service Convention. In

126. Decision of the Standing Committee of the National People's Congress Regarding the Exercise of Jurisdiction over Crimes Prescribed in the International Treaties which the PRC has Acceded to or Signed, STATE COUNCIL BULLETIN, July 10, 1987, at 561.

127. *See supra* note 118.

128. *E.g.*, Treaty Concerning Legal Assistance in Civil, Family and Criminal Matters; Jan. 12, 1960, Hung.-Albania, ch. II, 520 U.N.T.S. 3.

129. EXTERNAL AFFAIRS, *supra* note 57, App. E, at 91–99.

130. *See, e.g.*, the European Convention on the Transfer of Proceedings in Criminal Matters, *opened for signature* May 5, 1972, Europ. T.S. No. 73, 11 I.L.M. 709 which regulates the transfer of criminal cases to the jurisdiction of the requested member states. See also, the European Convention on the International Validity of Criminal Judgments, *opened for signature* May 28, 1970, 9 I.L.M. 450, which provides a mechanism whereby a member state that has passed a criminal judgment can request another member state to execute the judgment and punish the criminal in its jurisdiction.

131. Interview, *supra* note 30.

addition, the use of central authorities in Chinese treaties to facilitate judicial assistance shows its willingness to borrow devices that have proved successful in the international arena. When China will participate in the Hague Evidence Convention remains to be seen. Even in the present bilateral treaties, the provisions concerning the taking of evidence are skeletal at best and the effectiveness of their actual implementation is uncertain.

Short of treaty obligations, China still relies heavily on diplomatic channels for the service of documents and the taking of evidence abroad. By so doing, China manages to keep foreign courts at a safe distance, forcing them to communicate through convoluted bureaucracy. While these channels are neither efficient nor consistent, they do afford China a labyrinth to protect its sovereignty. In this, any attempt by foreign courts to elude diplomatic channels, and the limited number of other means for judicial assistance, is considered an infringement of sovereignty.

In the domestic legal framework, China now has a reasonably complete and forward-looking legislative scheme, but detailed regulations to implement the law are still lacking. Also, the judiciary has made the law ineffective in practice out of bureaucratic jealousy, ineptitude, paternalism, and insecurity about openness to the outside world. Consequently, the judiciary has added more red tape to the implementation of judicial assistance under treaty arrangements than through conventional diplomatic channels. The judiciary is also quick to permit service by post and other informal methods, on Chinese persons regardless of where they live, while overly cautious and timid in its approaches to matters involving foreigners.

Another problem is the uneven application of the principle of reciprocity to judicial assistance both in legislation and judicial practice. To China's advantage, its application has failed in the foreign service of documents in the PRC and seems to have reduced foreign courts' requests for the taking of evidence in China to an elaborate ruse. Thus reciprocity provides a convenient device that Chinese authorities can manipulate to a desired end.

Above all, the subtle signs of a willingness to reform China's judicial assistance legislation and treaties are overshadowed by China's half-hearted efforts to implement meaningful economic and political reforms. Without evidence of serious reform, other countries will not feel a need to respond to China's quest for a progressive regime of judicial assistance, nor will they cooperate with a country whose legal system remains immature and enjoys little confidence in the western world.